(13)

No. 108, Original

NOV 12 1991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION OF THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A RESPONSE *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS AND MEMORANDUM IN SUPPORT THEREOF

AND

RESPONSE *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

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The Central Nebraska Public Power and Irrigation District moves the Court for leave to file as *amicus curiae* in response to and in support of the motion of the State of Nebraska for leave to file an amended petition for an apportionment of non-irrigation season flows and for the assertion of new claims. The reasons for this motion are set forth in the accompanying memorandum.

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STATE OF NEBRASKA,
Plaintiff,

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STATE OF WYOMING,
Defendant.

**MEMORANDUM IN SUPPORT
OF MOTION FOR LEAVE
TO FILE A RESPONSE *AMICUS CURIAE***

INTRODUCTION AND STATEMENT OF THE CASE

This is an original jurisdiction proceeding brought by the State of Nebraska to enforce provisions of the Court's 1945 Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the "Decree") apportioning

the flow of the North Platte River among Nebraska, Wyoming and Colorado. Nebraska petitioned the Court in 1986 to enforce the Decree as to irrigation season flows (May 1 to September 30) and to provide injunctive relief against Wyoming. The Court referred the case to the Special Master by its order of June 22, 1987. The Special Master granted The Central Nebraska Public Power and Irrigation District ("Central"), and other movants for intervention, the right to participate in the proceedings as *amici curiae*,[1] and

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[1] "I envisioned the *amici* participating both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues." Special Master First Interim Report (June 14, 1989) at 6. Nebraska, for instance, expects that *amici* will be entitled to participate in the proceedings involving the amended petition. "[A]ll parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence. . . ." Nebraska's Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-irrigation Season Flows and for the Assertion of New Claims (October 9, 1991) ("Nebraska's Brief") at 42.

At oral argument in Salt Lake City on June 8, 1991, the Special Master indicated that present *amici* could again seek intervention. Central subsequently filed a motion to intervene which is pending before the Special Master. Nebraska has not objected to Central's motion to intervene. Nebraska's Response

(continued...)

Central has been participating in the proceedings in that capacity.

On October 9, 1991, Nebraska moved the Court for leave to file an amended petition for an equitable apportionment of non-irrigation season flows (October 1 to April 30) and for the assertion of new claims. On October 15, 1991, the Court directed that all responses be filed by November 12, 1991, in order to provide the Court with the benefit of the views of all the parties. Central seeks leave of the Court to respond to Nebraska's motion as *amicus curiae*.[2]

ARGUMENT

Nebraska's motion seeks, *inter alia*, leave to file an amended petition for an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte. The unapportioned, non-irrigation season flows, as well as the undiverted irrigation season flows of the North Platte River are collected and stored in Lake McConaughy, above the confluence of the North and South Platte

---

[1] (...continued)
to Central Nebraska Public Power and Irrigation District's, National Audubon Society's, and the Platte River Trust's Motions to Intervene (August 21, 1991) ("Nebraska's Response to Intervention Motions") at 1.

[2] *Cf. Nebraska v. Wyoming*, 485 U.S. 931 (1988) (granting motion of Basin Electric for leave to file response).

rivers.[3] Such flows are subsequently used for irrigation, generation of hydroelectric power, municipal use, maintenance of recreation uses (fishing, hunting and boating), and for waterfowl, fish and other wildlife habitat. Nebraska's Amended Petition at 5. Nebraska's amended petition further asserts that equitable interests in the State have historically relied upon these flows as part of the "regimen of the river." *Id.* at 6.

As Nebraska notes, "[t]hese uses are made possible principally through the operation of Lake McConaughy and other associated projects. . ." *Id.* at 5. Downstream equities are adversely affected "[w]hen Lake McConaughy does not have a sufficient water supply."[4] Parties and *amici* in this proceeding are litigating in various State and federal forums the appropriate downstream "regimen of the river," which is dependent, in large measure, upon the historic upstream "regimen of the river" and inflow into Lake McConaughy. Nebraska's Brief at 33-35. The location and operation of Lake McConaughy, therefore, becomes the critical fulcrum between the issues presented by Nebraska's amended petition and the "intramural disputes" in the other forums. *Id.* at 35.

---

[3] Nebraska's Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (October 9, 1991) ("Nebraska's Amended Petition") at 4.

[4] Nebraska's Brief at 10.

Thus, any foray into equitable interests dependent upon the "regimen of the river" necessarily affects Lake McConaughy and Central, the entity entrusted with its operation and management.[5] Central owns and operates Nebraska' largest irrigation district, and it constructed Lake McConaughy as a storage reservoir to serve irrigation needs in arid central Nebraska. Central, which operates as a not for profit entity, provides irrigation water directly or indirectly to over 500,000 acres of land. It is a public corporation and political subdivision of the State of Nebraska, created pursuant to Nebraska law. Neb. Rev. Stat. Section 70-601 *et seq.* (Reissue 1990). Central is governed by an elected board of twelve directors, three of whom must reside in each of four counties in south central Nebraska. Central has no taxing power and relies on the sale of services, including hydroelectric generation and delivery of irrigation water, for revenue from which to support district operations. Central may issue bonds for financing capital improvements and for related activities.

Pursuant to Nebraska law, Central acquires no ownership interest in the waters stored in Lake McConaughy, but only holds the storage water in trust for the purposes specified in the water rights

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[5] Indeed, in those other proceedings involving Central, the maintenance of the downstream "regimen of the river" is premised on Central's management of Lake McConaughy. Any diminution of flows into Lake McConaughy will clearly affect Central's interests.

issued to it by the Nebraska Department of Water Resources pursuant to Nebraska law, and for the benefit of the irrigators who rely upon storage water.

Central is arguably the most interested of all the *amici*. The operation of Central's system is built around the existing "regimen of the river." Nebraska's motion to file an amended petition is premised upon the need to protect the "regimen of the river" for the traditional equitable interests dependent upon this regimen. Any and all changes in the regimen will have an impact on how Central may or may not be able to operate its reservoir.

Moreover, should the Court grant Nebraska's motion, parties and *amici* in the proceeding will doubtless focus on the equitable interests dependent upon storage water in Lake McConaughy. As the operator of Lake McConaughy and various hydroelectric projects, as well as the entity managing the reservoir for equitable interests under Nebraska law, parties and other *amici* will invariably have to look to Central for information concerning the historic reliance by equitable interests, including Central, on the "regimen of the river."

Furthermore, because there is considerable disagreement among the "equitable interests" dependent upon the "regimen of the river," Central is likely to have different interests from Nebraska. Nebraska is placed in the untenable position of having to represent inherently conflicting interests in the same controversy. The State of Nebraska, as *parens patriae*, cannot adequately represent the interests of Central in this case.[6/] Nebraska, therefore, has not challenged Central's participation in this proceeding.[7/] Indeed, Nebraska fully expects Central to play a significant role in this proceeding. *See supra* note 1.

Consequently, in the interests of fairness and in order to afford the Court full illumination of the concerns of those dependent on the "regimen of the river," Central seeks leave of the Court to respond to Nebraska's motion.

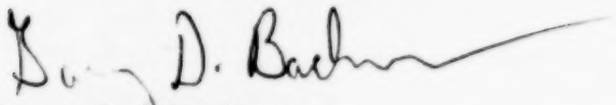
CONCLUSION

For the foregoing reasons, Central should be granted leave to respond as *amicus curiae*.

[6/] *See, e.g.*, Brief in Support of the Joint Motion of Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District to File a Joint Complaint in Intervention and for Leave to Intervene as Plaintiffs (April 15, 1987) at 5-19.

[7/] Nebraska's Response to Intervention Motions at 1.

Respectfully submitted,



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STATEMENT

On October 9, 1991, Nebraska moved the Court for leave to file an amended petition for an equitable apportionment of non-irrigation season flows (October 1 to April 30) and for the assertion of new claims. Central has sought leave of the Court to respond to Nebraska's motion as an *amicus curiae*. For the following reasons, this Court should grant Nebraska's motion.

ARGUMENT

I. Resolution of this Case Requires the Granting of Nebraska's Motion and Consideration of its Amended Petition.

During the course of this proceeding, the need for and appropriateness of Nebraska's motion to amend its petition has become abundantly apparent. For quite some time, the parties and *amici* have been arguing about equitable interests below the Tri-State Dam and the scope of the 1945 Decree. It has been Central's position that the 1945 Decree, as modified, incorporates the present "regimen of the river," free from currently planned and future upstream diversions in the State of Wyoming that

would reduce the non-irrigation season flows into Nebraska, and particularly into Lake McConaughy. As the operator of Lake McConaughy, Central has in the past, and thought it could in the future, rely upon the "regimen of the river" in managing the river for the equitable interests discussed in Nebraska's motion.

It would now appear that the uncertainty surrounding upstream development and its ultimate impact on water supply below the Tri-state Dam necessitates this Court's consideration and resolution of Nebraska's amended petition. Nebraska asserts that equitable interests in the State have historically relied on the over-appropriated and unapportioned flows of the North Platte River. Non-irrigation season flows are inextricably linked to the flows relied on by equitable interests during irrigation season; together, the two seasonal flows form part of "an integral hydrologic continu[um]." Nebraska's Brief at 21. To the extent that the "regimen of the river" and this hydrologic continuity is not already encompassed by the Decree, Nebraska's petition presents a much needed avenue for clarification.

II. Applicable Case Law And The Federal Rules of Civil Procedure Permit Nebraska to Amend Its Petition.

Central supports Nebraska's motion to amend its petition. The Court "has always been liberal in allowing full development of the facts" in original actions between sovereigns involving matters of high public importance. *United States v. Texas*, 339 U.S. 707, 715 (1950); *see also Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. 125, 144-45 (1902). This case is no different: it involves the interstate allocation of water--a matter of high public importance to the respective sovereigns and their citizenry.

Under Supreme Court Rule 17.2, the Federal Rules of Civil Procedure "may be taken as a guide to procedure in an original action in this Court" when appropriate. In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Court held that FED. R. CIV. P. 15(a)'s mandate that leave to amend pleadings "shall be freely given when justice so desires" "is to be heeded." None of the impediments to leave "freely given" set out in *Foman* such as "undue delay, bad faith or dilatory motive . . . undue prejudice to the opposing

party . . . futility of the amendment . . ."[9] are present here. As the entity charged with the management and operation of Lake McConaughy, and to which parties may turn for information on downstream equitable interests dependent on the "regimen of the river," Central will not be prejudiced by Nebraska's amended petition, nor does it appear to Central that any other participant will be so prejudiced. On the contrary, Central is of the opinion that the amendment is important to the full development and resolution of the case.

CONCLUSION

For the reasons stated above, Central requests that the Court grant Nebraska's Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims.

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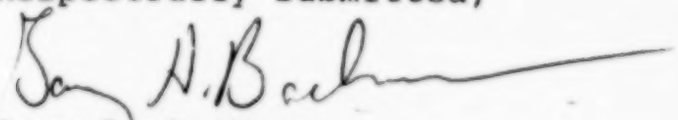
[9] *Id. See also* 3 J.W. Moore, R.D. Freer, MOORE'S FEDERAL PRACTICE ¶ 15.08 (2d ed. 1991).

Respectfully submitted,



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November 12, 1991

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This is to certify that the foregoing documents have been filed and served, by depositing true and correct copies thereof into the United States mail, first class, postage fully prepaid, on this 12th day of November, 1991, to each of the following:

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